



October Term, 1969.

No. 305

UNITED STATES OF AMERICA,

Appellant,

vs.

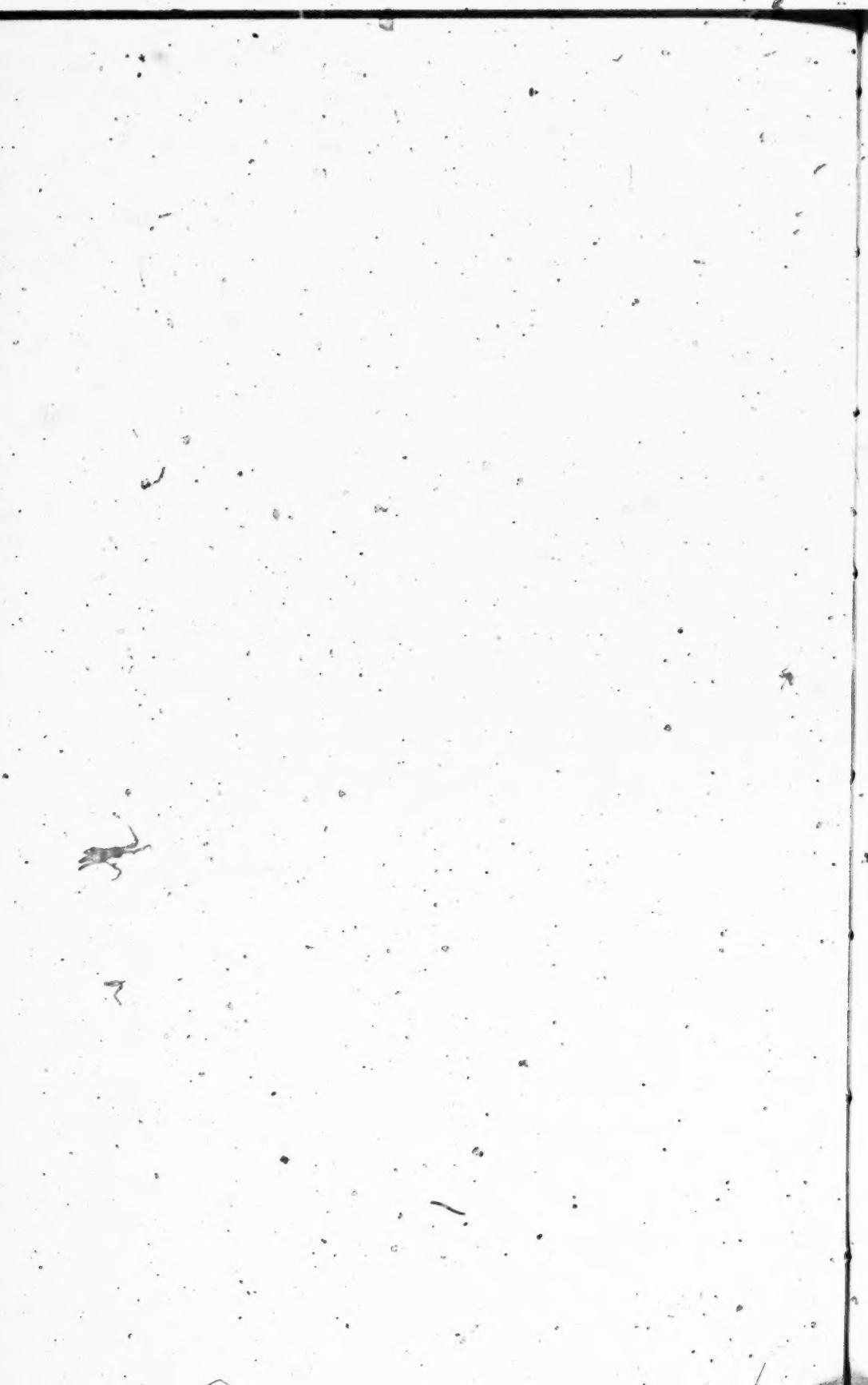
JOHN HENRY SISSEL, JR.

On Appeal from the United States District Court
for the District of Minnesota

BY
LAWYERS SELECTIVE SERVICE PANEL OF SAN FRANCISCO,
AS AMICUS CURIAE

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Subject Index

	Page
The Government of the United States may not, so long as the Constitution of the United States remains in effect, conscript American citizens to fight in an undeclared overseas war conducted in violation of the law of nations and of the treaty obligations of the United States	4
(A) The questions are important and require decision now	4
(B) On the merits, the questions must be decided in a way which leads to the affirmance of the judgment below	13
(1) As to the war declaring power.....	13
(2) As to this government's treaty obligations	14
(3) As to the use of Americans in an undeclared overseas conflict	15
(4) As to the constitutional question if the court refuses to hear appellee's contention	16

Table of Authorities Cited

Cases	Pages
Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464 (1947)	3
Baker v. Carr, 369 U.S. 186 (1962)	12
Child Labor Tax Case, 259 U.S. 20 (1922)	6
Clark v. Gabriel, 393 U.S. 256 (1968)	9
Goguen v. Clifford, 304 F. Supp. 958 (1969).....	17
Hamilton v. University of California, 293 U.S. 245 (1934)	8
Hart v. United States, 391 U.S. 956 (1968)	5, 12
Holmes v. United States, 391 U.S. 936 (1968)	2, 12
Koster v. Sharp, 303 F. Supp. 837 (1969)	17
McArthur v. Clifford, 393 U.S. 1002 (1968)	12
Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950)	9
Missouri v. Holland, 252 U.S. 416 (1920)	15
Mitchell v. United States, 386 U.S. 972 (1967)	10
Mora v. McNamara, 389 U.S. 934 (1967)	11
Morse v. Boswell, 393 U.S. 802 (1969)	5

TABLE OF AUTHORITIES CITED

	Pages
Oklahoma v. United States Court Service Commissioner, 330 U.S. 127 (1947)	3
Powell v. McCormack, 395 U.S. 486 (1969)	12
Ryerson v. United States, 312 U.S. 405 (1941)	3
Selective Draft Law Cases, 245 U.S. 366 (1918)	6, 7
Sellers v. Laird, 395 U.S. 950 (1969)	6
United States v. Bowen, F.Supp. (1969) (Criminal No. 42449, December 24, 1969)	17
Watts v. Indiana, 338 U.S. 49 (1949)	6
Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952)	14, 15, 16

Constitutions

United States Constitution:

Article I, Section 8, Clause 11	6
Article I, Section 8, Clause 15	4
Article VI, Section 2	15
Fifth Amendment	15

Statutes

Criminal Justice Act of 1964, 18 U.S.C.A. 30006A	2
Military Selective Service Act of 1967, Section 6(j), 50 U.S.C. App. 456(j)	17

Texts

Stern and Gressman, Supreme Court Practice, 4th Edition, 1969, p. 320, n. 85	1
The Prize Cases, 2 Black 635 (1863)	12

Miscellaneous

112 Cong. Rec. 19500 (1966)	5
112 Cong. Rec. 19720 (1966)	5
112 Cong. Rec. 19724 (1966)	5
Treaty of London, 59 Stat. 1544	10
Pub. L. 89-687, Title I, October 15, 1966, 80 Stat. 981	5
United Nations Charter Supremacy Clause, Article 103	14

In the Supreme Court
OF THE
United States

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vs.

JOHN HEFFRON SISSON, JR.

Appellant,

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF
LAWYERS' SELECTIVE SERVICE PANEL OF SAN FRANCISCO,
AS AMICUS CURIAE

Pursuant to the provisions of Rule 42, the Lawyers' Selective Service Panel of San Francisco has obtained written consents from all parties to file this brief as *amicus curiae*. The original letters of consent have heretofore been filed with the Clerk (Stern and Gressman, SUPREME COURT PRACTICE 4th Edition, 1969, p. 320, n. 85).

The Panel consists of a group of almost two hundred lawyers who have, under appointment by the judges of the Northern District of California, pursuant to the Criminal Justice Act of 1964, 18 U.S.C.A. 3006A, represented in the past two years upwards of several hundred young men of conscience who have been prosecuted because of their refusals to be conscripted.

While these refusals have been based on a variety of factors and while it is not always easy for their lawyers to isolate out those principally responsible for their clients' resistance to conscription, it seems fair to say that, out of their experience with these many objectors, the lawyers of the Panel have been impressed by the fact that one of the strong motivations for their client's risk of jail rather than conscription has been the belief that the war in Vietnam (which is the chief, if not the sole, occasion for their conscription) fails to command the support of the people of this country. One of the principal manifestations of this lack of support has been the fact that the elected representatives of the American people have not exercised their constitutional power to declare war on the Vietnamese people.¹

Another factor which appears to us to have strongly influenced our clients' resistance to conscription is the belief that, as the history of the Vietnam

¹Our clients, then, comprise a portion of that group who, according to Mr. Justice Douglas, "are being marched off to jail for maintaining that a declaration of war is essential for conscription [in the conflict in Vietnam]."² (*Holmes v. United States*, 391 U.S. 936, 949 [1968]).

conflict has unfolded before the eyes of a horrified world, it has been carried on in violation of the law of nations and contrary to the treaty obligations of the United States.

Under these circumstances, our clients have maintained that, as citizens of a constitutional republic, they may not be conscripted against their will to participate in such a war.

In this brief we shall attempt to establish that this Court has never said that a conscription statute can be constitutionally applied to those young men of this nation who refuse to participate in such a war, and to the extent that Judge Wysanski's decision recognizes that when so applied conscription is unconstitutional, it is solidly grounded and should be affirmed.²

²We recognize that both the Government's Jurisdictional Statement and its Brief seek the reversal of the judgment below on other and different grounds and that they make only passing reference (see Brief, p. 52, n. 17) to the questions here adumbrated. But if the judgment below is sustainable on any ground, whether or not asserted by the District Court, it will be affirmed here (*Ryerson v. United States*, 312 U.S. 405 [1941]; *Oklahoma v. United States Court Service Commissioner*, 330 U.S. 127 [1947]; *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464 [1947]).

THE GOVERNMENT OF THE UNITED STATES MAY NOT, SO LONG AS THE CONSTITUTION OF THE UNITED STATES REMAINS IN EFFECT, CONSCRIPT AMERICAN CITIZENS TO FIGHT IN AN UNDECLARED OVERSEAS WAR CONDUCTED IN VIOLATION OF THE LAW OF NATIONS AND OF THE TREATY OBLIGATIONS OF THE UNITED STATES.

(A) The questions are important and require decision now.

We here postulate four factors: (1) the government is conscripting to fill manpower needs created by the Vietnam war; (2) the war is undeclared; (3) it is an overseas war, not the suppression of an insurrection or the repulse of an invasion (compare United States Constitution, Article I, Section 8, Clause 15); (4) it is being conducted in violation of the law of nations and the treaty obligations of the United States.

We submit that if *any one* of the foregoing four postulates is true, then the government has no constitutional power to conscript men for service. If *all* of them (or any lesser number) are true, then so much the stronger is the constitutional case of our clients against conscription.

We take it that there is no dispute that the war is undeclared and that it does not involve an internal insurrection or an invasion. With respect to the other two factors: that conscription is principally to fill manpower needs in Viet Nam and that the war is being conducted in violation of international law and the United States' obligation thereunder, we call attention not only to the evidence given in this case by Professor Falk, but also to the widespread public notice which has attended these matters.

In *Morse v. Boswell*, 393 U.S. 802, 806 (1969), for example, Mr. Justice Douglas cited the legislative history of Pub. L. 89-687, Title I; October 15, 1966, 80 Stat. 981. This makes it clear that the Congress has understood the purpose and result of conscription since 1966 at least to be the procurement of manpower for the Viet Nam conflict.

Thus, Senator Lausche at 112 Cong. Rec. 19724 (1966) related conscription to "active military service in South Viet Nam"; Senator Symington, a member of the Armed Services Committee, said, ". . . we are daily inducting large numbers of men into the active forces to fight in Viet Nam" (112 Cong. Rec. 19720 [1966]); and Senator Saltonstall, the ranking minority member of the same Committee, spoke of ". . . service in Viet Nam . . . [by] new enlistees and draftees" (112 Cong. Rec. 19500 [1966]; italics supplied).

Earlier Mr. Justice Douglas had noted that it was in July of 1965 that the President announced an increase in the number of American troops to be sent to Viet Nam and a concurrent increase in draft calls. It was then that "the Nation as a whole for the first time probably realized that the Southeast Asian conflict would result in an extensive peacetime draft at home". (*Hart v. United States*, 391 U.S. 956, 959 [1968]; italics supplied).

At the close of the last term, Chief Justice Warren and Mr. Justice Marshall joined Mr. Justice Douglas in explicating that "registrants [are] being sent to Viet Nam" and made specific reference to the regis-

trants' "Viet Nam burden". (*Sellers v. Laird*, 395 U.S. 950, 954-955 [1969]). None of the other members of the Court suggested that these observations were not accurate reflections of the facts.

This Court has not refused to recognize facts so well known to all the world.

"All others can see and understand this. How can we properly shut our minds to it?" (Chief Justice Taft in the *Child Labor Tax Case*; 259 U.S. 20, 37 [1922]).

"And there comes a point where this Court should not be ignorant as judges of what we know as men." (Justice Frankfurter in *Watts v. Indiana*, 338 U.S. 49, 52 [1949]).

(1) Under our system of government, it is only Congress, "the great representative body of the people" (*Selective Draft Law Cases*, 245 U.S. 366, 390 [1918]), that has the power to declare war (United States Constitution, Article I, Section 8, Clause 11).

When the elected representatives of the people make a solemn declaration of war, with concomitant obligations thereby placed upon all of the citizenry, it may be conceded that Congress has the constitutional power to conscript, even for overseas military service—but that is not this case. This case questions Congress' power to conscript for overseas military service in a time of peace. And by "peace" can only be meant that state of affairs which exists absent the only constitutionally valid exercise of the power to create a state of war—i.e., the exercise by Congress of its war-declaring power. Whether the Executive may consti-

tutionally use *volunteers* to engage in overseas military action, "short of war," is not in this case either. Here, it is in reliance upon an act of Congress that the Executive, while this nation is still "at peace" in the constitutional sense, *conscripts* young Americans for the Vietnamese war or sends them to jail.³

(2) This Court has never said, nor have any of its predecessors, that peacetime conscription, for either overseas or home use is constitutionally permissible. The *Selective Draft Law Cases* obviously did not deal with this problem. To the contrary, the explicit basis for the holding that Congress had the power to conscript was the fact that Congress had already exercised its power to declare war:

"Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation *as the result of a war declared by the great representative body of the people* can be said to be the imposition of involuntary servitude, in violation of the prohibitions of the 13th Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." (245 U.S. at 390; italics supplied).

Whatever we may now think of this *ex cathedra* pronouncement, it certainly left it open that, absent a

³The "assumption" of the court below that peacetime conscription may be constitutionally permissible is too broad, at least insofar as it assumes that peacetime conscripts may be used in overseas military involvements.

declaration of war, conscription may run afoul of the Thirteenth Amendment.

(3) Individual Justices of this Court have consistently and expressly reserved decision on these questions.

In *Hamilton v. University of California*, 293 U.S. 245 (1934), Justice Cardozo, speaking for himself and for Justices Brandeis and Stone, left open the question of the "limits of governmental power in the exaction of military service when the nation is at peace" (at 265).⁴

In the years since *Hamilton*, the question has sharpened. Today the issue is not whether the Constitution permits a state to condition attendance at its university upon the taking of military training courses; it is rather whether the Constitution permits Congress, without a declaration of war, to conscript Americans whom the Executive thereafter sends overseas to fight in an undeclared war.

To date, no four Justices of the present Court have seen fit to take any of the recent cases which would

⁴*Hamilton* did not present a question of conscription into the armed forces of the United States. Neither the majority nor Justice Cardozo regarded ROTC training as anything like conscription—much less like involuntary overseas combat duty:

"The petition is not to be taken as showing that the students required . . . to take the prescribed course thereby serve in the army or in any sense become a part of the military establishment of the United States" (293 U.S. at 259).

". . . petitioners have not been required to bear arms for any hostile purpose, offensive or defensive, either now or in the future. They have not even been required . . . to join in courses of instruction that will fit them to bear arms" (*ibid.*, at 265-266).

have compelled the Court to address itself to these questions. But the questions are here and now; they are in this case and they are in Judge Wyzanski's opinion; they cannot be ignored. They will not go away. An entire generation of young Americans is apparently prepared to see to that.⁵

(4) The continued and increasing resistance of young Americans to participation in the Vietnam war has led to the continued and increasing use of the criminal provisions of the conscription laws.⁶ The use of the criminal process has in turn resulted in the attempted raising, as defenses to the criminal prosecutions, of questions of the nature of those here being urged. Quite uniformly, the lower federal courts have rejected these defenses and have said to young America:

“*You can't raise ‘political’ questions; you can either accept the ‘political’ decision to conscript you to fight in an undeclared Asian war or you can go to jail.*”

⁵We are heartened in once again pressing the issue by the fact that denials of certiorari carry “no implication whatever regarding the Court’s views on the merits.” (*Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 [1950], Frankfurter, J.)

“Wise adjudication,” said Justice Frankfurter, “has its own time in ripening” (*ibid.*).

We suggest that the time is now ripe and indeed overripe for the Court to address itself to questions which present some of the basic issues alienating the young people of our society from their government.

From Nuremberg to Tonkin to Pinkville, the “ripening” has taken place.

⁶This Court has pretty well emasculated any resort to civil remedies (*Clark v. Gabriel*, 393 U.S. 256 [1968]).

But the citizens of a constitutional republic who, under threat of imprisonment, are compelled to travel to distant lands to fight in an undeclared war have the right to challenge what is being done to them. If those most directly affected cannot make such a challenge, who then can? And what is the constitutional validity of a juridical theory that tells these citizens that they cannot make the challenge because the questions they raise are "political"?

(5) At least two Justices of the present Court have indicated a willingness to explore these questions and have been dissatisfied that this tribunal, which is the physical embodiment of "the rule of law" in America, should fail to treat of matters so profoundly affecting the younger 50% of our people.

In March of 1967, almost three years ago now, Mr. Justice Douglas expressed the first dissent from this "hands off" policy when, in *Mitchell v. United States*, 386 U.S. 972 (1967), he noted that a "recurring question in present-day Selective Service cases" was whether the provisions of the Treaty of London, 59 Stat. 1544, upon which the Nuremberg principle was based, constituted a defense to a prosecution for refusing to be conscripted to fight in Vietnam. He noted that Mr. Justice Jackson had stated, way back in 1945:

"If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." (386 U.S. at 973).

Our clients have repeatedly asked us, and we respectfully ask this Court, whether what Justice Jackson said in 1945 is the law in 1969—the year of Pinkville. If it is not, who undid it? If it is, then why may not those most directly affected by it raise the issue?

Later in 1967, Mr. Justice Stewart dissented from the denial of certiorari in *Mora v. McNamara*, 389 U.S. 934 (1967). There draftees had sought relief against orders to report to Vietnam and had asked for a declaration that American action in that country was "illegal." Mr. Justice Stewart found that the issues presented, some of which were "akin to those referred to by Mr. Justice Douglas in Mitchell . . ." were "of great magnitude." To him, they presented "large and deeply troubling questions" and he told his brethren, the bar, our clients, and all who would listen that "we cannot make these problems go away by simply refusing to hear the case. . . ." (389 U.S. at 935).⁷

The history of the last two years has borne out Mr. Justice Stewart's prediction. The "problems" have not gone away; nor can any intelligent person reasonably think that they are likely to go away. Indeed, in the last two years they have recurred again and again and again.

⁷Mr. Justice Douglas joined in the opinion and wrote an opinion of his own in which Mr. Justice Stewart concurred. Mr. Justice Douglas' opinion emphasized that the Court could not avoid its responsibility to the litigants (and to history) by refusing to consider the claims presented on the ground that they were "political." (389 U.S. at 935-939).

In the later case of *Holmes v. United States*, 391 U.S. 936 (1968), Mr. Justice Douglas noted that the questions here urged are "important" and "recurring" and come to the courts "in various forms in many cases as a result of the conflict in Vietnam." (at 949).⁸

In *McArthur v. Clifford*, 393 U.S. 1002 (1968), which once again posed questions arising out of the Vietnam war, Mr. Justice Douglas made it clear that to duck consideration of these issues on the ground that they present "political" questions is "to abdicate the judicial function which the Court honored [even] in the midst of the Civil War," referring to *The Prize Cases*, 2 Black 635 (1863). Cf. *Baker v. Carr*, 369 U.S. 186 (1962), and *Powell v. McCormack*, 395 U.S. 486 (1969).

In *McArthur*, the Justice noted that the question of "whether men may be sent abroad to fight in a war which has not been declared by Congress is "[a]n important unresolved constitutional issue of immediate importance to many Americans . . ."

"Whenever the Chief Executive of the Country takes any citizen by the neck and either puts him in prison or subjects him to some ordeal or sends

⁸In *Holmes*, Mr. Justice Stewart indicated that he did not join Mr. Justice Douglas only because in his view that case did not involve "the power, in the absence of a declaration of war, to compel military service in armed international conflict overseas." If that question had been presented there (as it is here) Mr. Justice Stewart stated unequivocally that he would have voted with Mr. Justice Douglas to grant certiorari.

Similar questions were presented in *Hart v. United States*, 391 U.S. 956 (1968), where Mr. Justice Douglas again dissented from the denial of certiorari.

him overseas to fight in a war, the question is justiciable".

"The specter of executive war-making is an ominous threat to our republican institutions. What can be done in Viet Nam can be done in many areas of this troubled world without debate or responsible public decision." (393 U.S. at 1002-1003).

(B) On the merits, the questions must be decided in a way which leads to the affirmance of the judgment below.

The statement of the reasons why the questions presented are important, *supra*, pages 4 to 13, really constitutes a statement of why the decision of Judge Wysanski needs to be affirmed.

We may briefly supplement what we have heretofore said with the following observations.

(1) As to the war declaring power:

The problem is that the decision-making system established by the Constitution has broken down. Congress was intended to play a major role in the initiation of wars, yet in this war it has played almost no role. This is more than a mechanical failure. The war in Vietnam is itself evidence of the wisdom of the framers' decision to put in the Congress the power to declare war. And, contrary to some arguments, it is even more important that that power be exercised in limited wars with limited objectives than in general war. For, as the Vietnam experience amply demonstrates, it is only in Congress that a full, frank, open discussion of the merits of committing troops to a

foreign war has even a chance of taking place. Such a discussion, which can lead to a clear, rational definition of the limits of American objectives in a war, can only take place in the halls of Congress.

If the courts continue to permit the Executive to by-pass Congress, the process of decision-making envisioned in the Constitution will break down even further.⁹ If the courts continue to refuse to hear Vietnam issues, that process will continue to fail to function properly. It is precisely at a point such as this, where a serious defect has appeared in the political process, that this Court is most justified in intervening to correct the situation. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

(2) As to this government's treaty obligations:

In this nuclear age, it is self-evident that domestic law must give way to international law if the world is to survive mankind's mounting destructive capabilities. Strong pleas for recognition of the need for giving precedence to international law are meeting with more and more success. Thus, the United Nations Charter Supremacy Clause, Article 103, provides

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Interestingly enough, and perhaps even more important for decision in this case, almost two hundred

⁹See Mr. Justice Douglas' observation that what is happening in Vietnam can happen in other areas of the world, *supra*, pp. 12-13.

years ago the Constitution of the United States was written to provide that

"... all treaties, made . . . under the authority of the United States, shall be the Supreme law of the land and the judges . . . shall be bound thereby . . ." United States Constitution, Article VI, Section 2.

The cases that have applied and sustained this power against conflicting state and federal legislation are legion and it would be a work of supererogation to cite them. But, sadly, it appears to be one thing to protect migrant birds (*Missouri v. Holland*, 252 U.S. 416 [1920]) and another to protect young Americans who refuse to become unwilling migrant warriors.

(3) As to the use of Americans in an undeclared overseas conflict:

An individual's personal rights should be equal to, if not greater than, an individual's property rights. Government can no more force an individual to engage in an illegal act than it can seize private property without just compensation. In *Youngstown Sheet and Tube, supra*, this Court enjoined the President himself from acting on the assumption that as Commander in Chief of the armed forces he could, "without support of law, . . . seize persons or property because they are important or even essential for the military and naval establishment." (343 U.S. at 646 [concurring opinion]).

A soldier seized by the government, no less than a steel company, is protected by the Fifth Amendment. The legal power of the government to ship a soldier to Vietnam rests upon weaker grounds than the govern-

ment's power to seize steel plants. In *Youngstown* the government failed to sustain its burden, even in light of the Korean conflict and a United Nations action. In the case of Vietnam there has been no approval by the United Nations of the United States action. The government cannot summarily violate its constitutional restrictions. The conscription of a young man into a pool of military manpower for Vietnam under the circumstances here presented is a violation of the Constitution.

(4) As to the constitutional question if the Court refuses to hear appellee's contentions:

To put it bluntly, John H. Sisson, Jr., a young American of unquestioned integrity, has said, as have thousands upon thousands of his contemporaries, that he cannot and will not participate in the war in Vietnam, for reasons which touch upon the deepest chords of his existence as a responsible human being. For their like refusal to participate in the organized slaughter of Asian people young Americans by the thousands are being threatened with jail. They turn to their lawyers and ask a simple question: Must we murder Vietnamese or go to jail? As their lawyers, we now ask this Court: Does the Constitution of the United States permit our clients to be imprisoned because they are refusing to be conscripted to participate in an undeclared foreign military "action"?

These questions have by this case now been placed before this Court. We lawyers of the Selective Service Panel and our clients have struggled with them

in the lower courts for over two years now. We await this Court's answer. So indeed does the world.

We think that the American Constitution is more important than the war in Vietnam.

We urge this Court to decide that this is so, by affirming Judge Wyzanski's decision in this case.¹⁰

Dated, San Francisco, California,

December 31, 1969.

Respectfully submitted,

LAWYERS' SELECTIVE SERVICE

PANEL OF SAN FRANCISCO,

By NORMAN LEONARD,

Attorney for Amicus Curiae.

¹⁰Judge Wysanski's opinion that a "selective" conscientious objector has a constitutional right to exemption from combat in Vietnam and therefore from induction into the armed forces has been buttressed by the recent opinion of Judge Weigel of the Northern District of California in *United States v. Bowen*, ____ F. Supp. ____ (1969) [Criminal No. 42449, December 24, 1969]. Judge Weigel held that Section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. 456(j), is unconstitutional because it discriminates between those religious beliefs which condemn opposition to all wars and those which condemn opposition only to "unjust" wars.

Judge Wysanski's opinion that §6(j) invalidly discriminates between religious and non-religious conscientious objectors has been buttressed by the recent decisions of Judge Masterson of the Eastern District of Pennsylvania (*Koster v. Sharp*, 303 F. Supp. 837 [1969]) and Judge Cohen of the District of New Jersey (*Goguen v. Clifford*, 304 F. Supp. 958 [1969]). In both these cases it was held that the legislative standard of "religious training and belief" is violative of the First Amendment's proscription of the establishment of religion and of the due process and equal protection guarantees of the Fifth and Fourteenth Amendments.